

DAVID A. BOONE, ESQ., #74165  
SUSAN D. SILVEIRA, ESQ. #169630  
LAW OFFICES OF DAVID A. BOONE  
1611 The Alameda  
San Jose, California 95126  
Telephone: (408) 291-6000  
Facsimile: (408) 291-6016

ATTORNEYS FOR DEBTORS  
James and Margaret Carpenter

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re:	)	Case No. 02-55966 ASW
JAMES CARPENTER	)	Chapter 13
MARGARET CARPENTER	)	
	)	
Debtors.	)	ADVERSARY NO. 03-5627
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JAMES CARPENTER	)	
MARGARET CARPENTER	)	
	)	
Plaintiffs	)	DATE: February 10, 2005
vs.	)	TIME: 3 PM
	)	PLACE: 3099
Judy Russell and Bob Griffiths,	)	
individually; and as successors to G & R	)	
Investments, Inc., assignee of	)	
Daylight Way Family Partners, and	)	
Randall C. Creech of Creech	)	
Liebow & Kraus	)	
	)	
	)	
Defendants.	)	
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**PLAINTIFFS' RESPONSE TO OPPOSITION TO MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Plaintiffs, James and Margaret Carpenter, respond to the opposition to their Motion for  
Partial Summary Judgment as follows:

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1 Trustee is empowered to seek avoidance of this preferential transfer because the language of the  
2 statute states, "...the trustee may avoid any transfer of an interest of the debtor in property". 11  
3 U.S.C. §547(b). However, Ninth Circuit case law provides that Chapter 13 debtors have standing  
4 to exercise trustee avoiding powers for the benefit of the estate. In re Cohen, 305 B.R. 886 (9<sup>th</sup>  
5 Cir. BAP 2004). That court observed:

6           The rub in searching for a basis for standing to exercise avoiding  
7 powers in chapter 13 is that the text of chapter 13 does not say in so many  
8 words that anybody has authority to exercise trustee avoiding powers.  
9 Although recoveries on account of avoided transfers are always for the  
10 benefit of the estate to the extent not exempt and constitute property of the  
11 estate, chapter 13 does not expressly authorize anyone-neither chapter 13  
12 trustees nor chapter 13 debtors to exercise trustee avoiding powers. In re  
13 Cohen, *ibid*, at 893.

14 After a lengthy analysis, the Bankruptcy Appellate Panel for the Ninth Circuit concluded:

15           It would be an odd system that would require a chapter 13 debtor to  
16 depend upon the recovery of an avoidable transfer in order to have a  
17 confirmable plan but not permit the debtor to avoid the transfer.

18           The key question is whether a chapter 13 debtor holds trustee  
19 powers concurrent with the trustee. The statute at section §1303 names  
20 trustee powers that debtors hold exclusive of the trustee but is silent with  
21 respect to other powers.

22           In view of the structure of the rest of the chapter 13 system in  
23 which debtor retains possession of all property of the estate, including the  
24 proceeds of avoiding actions, and is unable to use such property without  
25 court permission, we think that the construction of §1303 most consistent  
26 with the whole of the Bankruptcy Code is that, by listing powers the  
27 debtor holds exclusive of the trustee, it leaves the debtor with other powers  
28 that may be exercised concurrent with the trustee. In re Cohen, *Ibid*, at  
897.

.....In the end, the risk of mischief from debtor exercise of  
avoiding powers is eliminated by the provisions limiting a debtor's ability  
to use property of the estate without permission from the court. Thus, the  
terms of the Bankruptcy Code, itself, support the conclusion that Chapter  
13 debtors may exercise avoiding powers concurrently with the trustee. In  
re Cohen, *Ibid*, at 899.

Although the *Cohen* case involved the trustee avoiding powers of 11 U.S.C. §544, Plaintiffs  
assert that the same logic applies to the avoiding powers set forth in 11 U.S.C. §547. Thus, the  
debtors do have standing to avoid the preferential transfer of the judicial lien of the Defendants.

The United States Bankruptcy Court for the District of Oregon reached the same  
conclusion regarding debtor standing to exercise trustee powers under 11 U.S.C. §547(b). In re

1 Straight, 35 B.R. 445 (Bankr. D. OR 1983) In that case, the court upheld the debtors right to  
2 void a writ of garnishment as a preference under 11 U.S.C. §547(b). The court adopted the  
3 analysis of the bankruptcy judge:

4           The monies collected by defendant collection agency through its  
5 writ of garnishment constituted a voidable preference within the meaning  
6 of §547(b) of the Bankruptcy Code. Ordinarily, it is the trustee in  
7 bankruptcy who would be avoiding such a transfer and recovering the  
8 property transferred for the benefit of all creditors. However, under  
9 §522(h) of the Code, a debtor is given the same rights as a trustee if the  
10 transferred property would otherwise be exempt and the trustee chooses  
not to avoid the transfer. One of the rights given to trustees under §550(a)  
of the Code– and extended to debtors pursuant to 522 (i)(1)– is the right to  
recover property subject to a voidable preference not only from the  
debtor’s immediate transferee but from any subsequent transferee of such  
initial transferee, subject to certain exceptions which do not apply here. In  
re Straight, Ibid, at 446.

11 Accordingly, the Plaintiffs Motion for Partial Summary Judgment is properly before the court.  
12 The Plaintiffs seek summary judgment on their cause of action based on 11 U.S.C. §547(b).  
13 Their motion sets forth all undisputed facts with respect to each of the elements necessary to  
14 establish an avoidable preference. The Defendants have not brought forth any evidence to show  
15 that a dispute as to a material fact exists with respect to the facts supported by Plaintiff’s  
16 declaration and the court record. Therefore, the Plaintiffs are entitled to a ruling that the  
17 recording of the Defendant’s judicial lien on or about September 16, 2002 is avoided as a  
18 preference rendering their claim unsecured in its entirety.

19 DATED: February 3, 2005

THE LAW OFFICES OF DAVID A. BOONE

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24 By: /s/DAVID A. BOONE  
25 Attorneys for Plaintiffs, James and Margaret Carpenter  
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